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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 71 - 133

JAMES F. HOLLAND

Petitioner

v.

ELIZABETH JANE HOLLAND

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

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No.

JAMES F. HOLLAND
Petitioner
v.
ELIZABETH JANE HOLLAND
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner, James F. Holland, prays for a writ of certiorari to review the orders of the Supreme Court of Ohio entered April 7, 1971, overruling his motion to certify and dismissing, sua sponte, his appeal of right from the judgment entered on January 7, 1971, by the Court of Appeals for Franklin County, Ohio, affirming the decree of divorce of the Court of Common Pleas (Division of Domestic Relations), Franklin County, Ohio, in Case No. 140,522. The Supreme Court of Ohio overruled petitioner's motion for rehearing on April 28, 1971.

OPINION BELOW

The Supreme Court of Ohio wrote no opinion. The Court of Appeals for Franklin County, Ohio, rendered a written decision on December 22, 1970 (Appendix A, *infra*, pp. 11-15).

JURISDICTION

The orders of the Supreme Court of Ohio entered on April 7, 1971, overruling the petitioner's motion for an order directing

the Court of Appeals for Franklin County, Ohio, to certify its records (App. B, *infra*, p. 16) and dismissing, sua spouti, the appeals of right (App. C, *infra*, p. 17) are attached hereto. The jurisdiction of this Court is invoked under Rule 19 and 28 U.S.C. 1257 (3), which provide for review of final judgments rendered by the highest court of a state by writ of certiorari, "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

QUESTION PRESENTED

Was petitioner deprived of his rights, privileges, and property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States where a decree including provisions for divorce, custody of minor children, division of marital property, alimony and child support and for placing petitioner's property in trust is journalized without affording the petitioner an evidentiary hearing when petitioner and respondent are not in agreement on the substance of such decree.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of relevant constitutional and statutory provisions involved herein is contained in App. D, *infra*, p. 18. There relevant provisions are:

Fourteenth Amendment to Constitution of the United States; Section 3105.10 of the Revised Code of Ohio.

STATEMENT OF THE CASE

On February 18, 1969, Elizabeth Jane Holland, hereinafter called respondent, filed her petition in the Court of Common Pleas (Division of Domestic Relations), Franklin County, Ohio, against James F. Holland, hereinafter called petitioner, alleging that she and the petitioner were married on May 1, 1948, and

that six children, varying in ages from 6 to 20 years, were born as issue of the marriage; that the petitioner had been guilty of gross neglect of duty and extreme cruelty. Wherefore, she prayed that she be awarded temporary and permanent alimony; that she be awarded custody of the children; and that she be awarded temporary and permanent support money and expense money.

Thereafter, on October 30, 1969, by leave of court, the respondent filed an amended petition making substantially the same allegations, but, in addition, alleging that the petitioner had entered into a series of agreements with various corporations for the purpose of placing the assets of specified corporations outside the reach of the respondent's request for alimony. The respondent, in her amended petition, asked that she be awarded an absolute divorce; that the agreements entered into by the petitioner be set aside; that a constructive trust be imposed upon the funds derived from the sale or liquidation of the assets earned by the petitioner; that she receive temporary and permanent alimony, temporary and permanent custody of the children, and temporary and permanent support money for the children, as well as expense money.

On January 16, 1970, the petitioner answered respondent's amended petition admitting the marriage and that six children were born thereof. The petitioner, by his answer, denied all other allegations of the amended petition.

On March 18, 1970, the domestic relations proceeding initiated by the respondent was docketed for a hearing on the merits at 9:00 A.M. However, the trial court, after disposing of some preliminary matters in other cases, invited counsel for the parties into chambers to discuss the possibility of settlement. These discussions between counsel for the parties continued in chambers with periodic conferences with their respective clients until approximately 3:00 P.M. It then appearing that there was substantial agreement between the parties with respect to distribution of property, the matter of alimony, custody of children, and similar matters, the Court called the parties and their counsel together in the library, at which time the Court, in the presence of a reporter, summarized what it understood to be the nature of the agreements. In accordance with the practice of the Court, the parties were to prepare and agree upon a decree for submission to the Court for its approval.

A few days after the March 18 conference in chambers, counsel for the petitioner, by telephone, called counsel for respondent and stated that petitioner wanted to increase the period of alimony payments from five to ten years. Counsel for respondent did not object, but said he would have to consult with his client.

Early in April, 1970, counsel for petitioner presented to counsel for respondent a proposed decree, which embodied petitioner's understanding of the agreements reached on March 18, 1970. Counsel for petitioner reviewed the details of the proposed decree with counsel for respondent. During that discussion, counsel for petitioner pointed out that unless the alimony payments to respondent extended for more than ten years rather than for five years as agreed on March 18th, his client could not claim the payments as a tax deduction. It appeared at that time that respondent's counsel was in agreement. He indicated that he would review the matter with his client the next day and would contact counsel for petitioner.

Although repeated efforts were made over the next several weeks to contact counsel for respondent and to learn whether the proposed decree was satisfactory to respondent, it was not until after respondent's motions to cite the petitioner for contempt had been filed and served upon the petitioner by the Sheriff that respondent's counsel submitted a proposed decree to petitioner. The decree proposed by respondent was entirely unacceptable and contrary to petitioner's understanding of the agreement reached on March 18 during the extended conference by counsel in the chambers of the trial court.

Thereafter, on May 20, 1970, counsel for the respondent presented his version of what was to be an agreed decree to the trial court without the approval of counsel for the petitioner. The Court, without hearing evidence on the record with respect to grounds for divorce, amounts and values of property owned by the parties, the relative income and expenses of the parties, or other matters relative to the petitioner's rights, privileges, and property, signed and filed the entry proposed by counsel for the respondent (App. E, *infra*, pp. 19-23).

Petitioner filed a motion for a new trial which came on for hearing on July 22, 1970. The trial court found the motion to be without merit. The trial court found the motion to be

without merit. The petitioner thereupon appealed to the Court of Appeals for Franklin County, Ohio.

The intermediate appellate court, by decision of December 22, 1970 (App. A, *infra*, p.11-15) finding neither error nor abuse of discretion on the part of the trial court with respect to the manner in which the hearings and trial were conducted or with respect to the manner in which the decree was signed and filed, affirmed the judgment of the Court of Common Pleas, Division of Domestic Relations. The appellate court's judgment was journalized (Appendix F, *infra*, p. 24) on January 7, 1971.

As noted above, on April 7, 1971, the Supreme Court of Ohio overruled the petitioner's motions to certify and dismissed, sua sponte, the petitioner's appeal of right in the aforementioned case.

HOW FEDERAL QUESTION PRESENTED

The constitutional question here involved was first put in issue in the briefs and arguments before the Court of Appeals for Franklin County, Ohio, and again in the petitioner's memorandum in support of jurisdiction in the Supreme Court of Ohio in Case No. 71-79.

REASONS FOR GRANTING THE WRIT

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> " *** No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *** "

An essential element of due process of law is a hearing or an opportunity to be heard on the merits of a cause. The hearing or an opportunity to be heard is not a matter of grace but one of right safeguarded to all by the due process clause of the Federal Constitution. *Shelley v. Kraemer*, 334 U.S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1161, 3 A.L.R. (2d) 441, 16A C.J.S., Constitutional Law, Section 622.

The right to a hearing or an opportunity to be heard within the requirement of the due process clause includes not only the

right of a party to be present during the taking of testimony and to appear or be represented by counsel. It also includes the opportunity to know the claims of his opponent, hear evidence introduced against him, cross-examine witnesses, introduce evidence in his own behalf and present proper argument as to law and fact. A hearing or an opportunity to be heard before judgment with full opportunity to present all the evidence and arguments which the party deems important is guaranteed by due process of law. 16A C.J.S. 825, Constitutional Law, Section 622. An adjudication affecting marital status and finally determining personal and property obligations must be preceded by an opportunity to be heard. *McLean v. McLean*, 233 N.C. 139, 63 S.E. (2d) 138.

The policy of the law is not to grant a decree of divorce by default. There can be no divorce without evidence. *McAllister v. McAllister*, 27 Ohio L. Abs. 80 (C.A., 1939); *Ridgeway v. Ridgeway*, 69 Ohio L. Abs. 341 (C.A., 1954), 162 Ohio St. 119, cert. den. 348 U.S. 971, 75 Sup. Ct. 531.

Under Ohio statutory law, there must be a hearing and satisfactory proof of the allegations of the petition in a divorce action. Section 3105.10, Revised Code, expressly provides, *inter alia*:

> "The court of common pleas *shall hear* any of the causes for divorce charged in the petition and may, *upon proof* to the satisfaction of the court, pronounce the marriage contract dissolved and both of the parties released from their obligations." (Emphasis added.)

It is clear from the record in the case at bar that the representatives of the parties in an extended negotiating conference in the chambers of the trial court attempted to work out an agreement for the disposition of property, custody; alimony, child support, and expense money. It is equally clear that in attempting to put the agreements into written form, the parties had different ideas as to the nature of the understanding. When the parties were unable to agree upon a written judgment entry, the Court was without jurisdiction to journalize the written version of one party or the other without the approval of both. When the Court did so, it deprived the party not agreeing to the entry of his rights, privileges and property without due process of law.

Minimal due process requires that where there is no waiver or consent, the parties are entitled to a determination of their dispute by a court on the basis of facts submitted to the court. The dispute in the case at bar, as in most domestic relations cases, involves not only whether cause is shown for divorce, but also important questions regarding alimony, child support, child custody, visitation rights, division or property, and similar items for determination. Litigants are entitled to the independent judgment of the court on the basis of evidence adduced at a hearing. After judgment is rendered on the basis of evidence heard in open court, parties then are entitled to a review of the trial court's judgment to ascertain whether or not the determination is contrary to law and the evidence. Clearly, where a decree, as in the case at bar, is journalized without the consent of all parties and without an evidentiary hearing, the parties are deprived of the right of cross-examination, the right to confront witnesses against them, and the right to obtain judicial review on a record of evidence.

In the case at bar, the petitioner, who did not and does not agree with the respondent's version of the negotiated understandings reached on March 18, 1970, which was journalized as a decree, has clearly been deprived of all indicia of due process.

The Court of Appeals, without citation of authority, purports to distinguish between extra judicial settlements and in-court settlements. Petitioner contends that there is no legal basis for such a distinction. Regardless of where reached, there is no agreement unless the parties mutually agreed to its terms. Certainly, an in-court agreement must be evidenced by a signed written document. That written document may be a judgment entry signed by counsel for all parties or it may be a judgment entry incorporating by reference the written document of agreement signed by the parties.

The Court of Appeals, in the case at bar, after an examination of the transcript of the trial court proceedings on March 18, 1970, where the trial court reviewed the settlement terms with the parties, finds no indication whatsoever that the alimony payments were to continue only for a period of five years. It observes that if there was a mistake as to the terms of the agreement, it was a unilateral mistake on the part of the petitioner. The difficulty with this approach is that solely on

the basis of an examination of the words taken and transcribed by a court reporter in the final few minutes of an extended negotiation conference, an appellate court purports to say what was heard and understood by the parties at the time when the oral summarization of an extended period of negotiations was taking place. It is a common human experience that matters which may sound clear when expressed orally are not, in fact, clear when seen in writing. Further, matters orally stated in the course of oral negotiations which may seem clear are not so understood when reduced to written form.

In the case at bar, a few days after the March 18 conference in chambers, counsel for petitioner called counsel for respondent and stated that petitioner wanted to increase the period for payment of alimony to ten years rather than five. Counsel for respondent did not object, but said he would have to consult with his client. Thereafter, early in April, 1970, counsel for the petitioner presented a proposed judgment entry to counsel for the respondent, which embodied petitioner's understanding of the agreements reached on March 18, 1970. Counsel for the petitioner reviewed the terms of the proposed judgment entry with counsel for the respondent. During that discussion, counsel for petitioner pointed out that unless the alimony payments to the respondent extended for more than ten years rather than five years, petitioner could not claim the payments as a deduction. Respondent's counsel appeared to be in agreement. However, he indicated that he would review the matter with his client the next day and would be in contact with counsel for the petitioner. Nearly a month later respondent proposed a judgment entry which was contrary to petitioner's understanding of the agreement reached during the extended negotiations by counsel in chambers on March 18. Thereafter, on May 20, 1970, counsel for respondent presented to the trial court an entry containing his version of the agreements reached by the litigants without the approval of counsel for the petitioner. The Court, thereupon, signed the entry and filed it on the same day.

The respondent, the trial court and the Court of Appeals apparently believe that the only issue in a domestic relations dispute requiring an evidentiary hearing is the grounds for divorce and that litigants' property rights, rights to custody of children, visitation rights, and other matters incident to a

divorce need not be tried. Petitioner submits that this is a very myopic view of sound judicial administration and due process. Petitioner strongly contends that due process requires a hearing, an opportunity to present evidence, to cross-examine witnesses, and to make arguments on all issues where there is no agreement between the parties litigant. Petitioner submits that no valid distinction can be made between negotiations conducted between litigants alone and negotiations conducted between litigants in the presence of the court, which would permit the court to enter a final judgment according to its interpretation of agreements reached where, in fact, the parties have not agreed.

In this connection, the remarks of the trial count in overruling the petitioner's motion for a new trial are illuminating

> "Now, this isn't the first time this has happened. This is probably two or three hundred times I've heard this. It usually isn't from the attorneys, it's usually from the attorney's client who goes home and comes back later and says, 'But I didn't understand it that way and therefore I feel that the order is not proper.'
>
> * * *
>
> " *** This case is now a year and a half old and I think all causes at some time need to come to a conclusion and that is why this Court is going to—I'm going to overrule the motion for a new trial at this time. ***."

It is respectfully submitted that the risks of depriving any litigant of due process where there is negotiation of a settlement, even in chambers, may be avoided simply by having those agreements with respect to property, alimony, custody, and similar matters reduced to writing and signed by the parties. Thereafter, the Court should hold a hearing on the grounds for divorce and incorporate the written signed agreement in the decree of divorce. This simple procedure would not delay the adjudication of domestic relations disputes, but would protect all parties against the lack of due process in the event the parties are unable to agree on property, alimony and child support issues. If this procedure is followed and a written agreement is not executed, then both parties are free to present evidence to the court on all matters and to obtain the independent judgment of the court on such factual and legal questions.

CONCLUSION

Admittedly, a trial court in an urban center with jurisdiction over domestic relations is faced with a tremendous volume of cases which must be handled in some manner. Without question, the pressure posed by the mass of litigants and the character of their problems may render it difficult to follow all the traditional judicial procedures. However, the exigencies or the problems presented should not obscure the fact that a domestic relations tribunal is a court and not merely another social agency. Frequently, as in the case at bar, if the same amount of time devoted to seeking a settlement through negotiation and mediation under the auspices of the trial judge had been spent in hearing the evidence, a decision could be rendered which would protect the interests of the parties and the integrity of the court.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully, submitted,

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON, BROWN & NEWMAN
By RANKIN M. GIBSON
42 East Gay Street
Columbus, Ohio 43215

Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Elizabeth Jane Holland,
Plaintiff-Appellee,

vs. No. 9883

James F. Holland,
Defendant-Appellant.

DECISION
Rendered on December 22, 1970

MR. HARRY LEWIS,
8 East Broad Street,
Columbus, Ohio 43215,
For Plaintiff-Appellee.

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON, BROWN & NEWMAN,
MR. RANKIN M. GIBSON and
MR. ROBERT E. ALBRIGHT,
42 East Gay Street,
Columbus, Ohio 43215,
For Defendant-Appellant.

---

1. It is not error for a court to permit an amended petition (or complaint) to be filed changing an action from one for alimony only to one for divorce and alimony where there is service upon the defendant upon the amended petition and the case proceeds to trial upon the amended petition.

2. An in-court agreement of the parties concerning division of property and alimony adopted by the court as its judgment thereon is enforceable by the court and may be incorporated

into the judgment entry even in the absence of an agreement in writing, or an approval of the judgment entry, signed by a party or his attorney,

3. Such an in-court settlement agreement is enforceable by the court even where one of the parties to such settlement intended to include additional provisions or limitations which were neither included in the settlement agreement nor expressed by such party at the time of making such agreement.

WHITESIDE, J.

This is an appeal upon questions of law from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, granting a divorce to the plaintiff-appellee and awarding alimony to plaintiff-appellee, both by division of property and periodic payments.

The defendant-appellant assigns two assignments of errors as follows:

"1. The trial court erred in permitting the plaintiff to convert a cause of action for alimony only into a cause of action for divorce and alimony by amendment of her petition.

"2. The trial court erred in journalizing the decree of divorce on May 20, 1970, without affording the defendant a hearing when the plaintiff and defendant were not in agreement on the contents of the decree journalized."

With regard to the first assignment of error, it appears that plaintiff-appellee originally on February 18, 1969, filed a petition for alimony only. Defendant-appellant filed an answer thereto on or about August 14, 1969. By entry of October 30, 1969, plaintiff-appellee was granted leave to file an amended petition seeking a divorce. The amended petition seeking a divorce and alimony was duly filed on October 30, 1969.

The first attempt to obtain service upon defendant-appellant upon the amended petition was unsuccessful. An alias summons was issued and defendant-appellant was served upon the

amended petition on December 2, 1969. Defendant-appellant filed an answer to the amended petition on January 16, 1970. Essentially, therefore, the first assignment of error is predicated upon a contention that it is prejudicial error to permit an amendment to a petition to be filed changing an action from one for alimony only to one for divorce and alimony even when such amended petition is filed before trial, the defendant is served with summons thereof, and files and answer thereto.

Defendant-appellant relies upon the cases of *Hiler vs. Hiler*, 14 Ohio App. 174 and *Thompson vs. Thompson*, 42 Ohio App. 164. In the *Hiler* case the amendment was made after decree rather than before trial. In the *Thompson* case the amendment was made after trial but before decree. At page 166 of the *Thompson* case, the court therein distinguished the instant situation as follows:

> "It is next suggested that the case could be considered upon the amended petition as an original petition, since personal service was had on the defendant and all the original allegations were incorporated therein; that the mere designation 'Amended Petition' should not prevent the consideration of the pleading as an original petition.
>
> "We are of opinion that this might be done, and, had the case been tried on the amended petition as an original petition, no prejudice would have resulted. But according to the record, there has never been a trial upon the amended petition. The trial was had on the original petition. Thirty-six days later, no decree having been rendered, at the suggestion of the court that amended petition was filed. Some months later, without further hearing, a decree was placed of record. We have, therefore, a decree entered in one lawsuit based presumably upon the evidence adduced in another lawsuit."

In this case, the trial was upon the amended petition. Furthermore, the defendant-appellant did not object to the filing of the amended petition or to the granting of leave to file same, but merely filed a general denial thereto. Defendant-appellant raises this question for the first time on appeal. This court finds that there was no prejudicial error on the part of the trial court in permitting the amended petition to be filed changing the action from one for alimony only to one for divorce and alimony and proceeding to trial upon the amended petition. Therefore, the first assignment of error is not well taken.

With regard to the second assignment of error, it appears that a conference was held between the court, the parties, and their attorneys prior to trial at which conference an agreement was reached with regard to division of property and alimony. The defendant-appellant now contends that his understanding of this agreement differs from that of the court and the plaintiff-appellee.

From the record of the hearing upon the motion for new trial, it appears that following the conference, a trial was held upon the merits of the amended petition at which the plaintiff-appellee persented evidence but at which the defendant-appellant did not appear at all, (R. 17-20). Apparently no court reporter was present at this hearing upon the merits, and, in any event, there is no bill of exceptions before this court with regard to the trial on the merits.

Subsequently, a journal entry was duly filed without approval of counsel for defendant-appellant but with a notation that it had been submitted to counsel for defendant-appellant for approval but had not been approved. It appears (R. 22) that the basic difference between the "understanding" of defendant-appellant and that of the court and plaintiff-appellee was whether or not the alimony payments were to continue for a period of only five years or were to be lifetime alimony ceasing only upon remarriage of the plaintiff-appelle.

There is also in the bill of exceptions a transcript of preceedings on March 18, 1970, which appears to be the conclusion of the conference during which the court reviewed the settlement agreed to by the parties and the parties specifically agreed to the terms as set forth by the court, (R. 2-15). There is no indication whatsoever therein that the alimony payments were to continue only for a period of five years.

The trial court found that the journal entry correctly reflected the agreement of the parties regarding property settlement and alimony payments made before the court, (R. 27, 28, 30). This agreement was adopted by the court and made a part of the judgment of the court (R. 2).

A distinction may be made between extra-judicial settlements and a settlement made in court. Defendant-appellant contends that in both instances such agreement can be evidenced only by a judgment entry signed by counsel for all parties. In this case,

the settlement was made before the court and the court adopted the settlement as its judgment as to division of property and alimony. Under such circumstances, there was no need for any writing signed by defendant-appellant or his attorney to evidence the terms and conditions of the settlement. This is especially true, where, as here, the agreement was read into the record.

It would appear from the bill of exceptions that the judgment entry correctly reflected that to which the parties agreed. Defendant-appellant contends that the judgment entry does not reflect what he thought he was agreeing to. If there were a mistake as to the terms of the agreement, it was a unilateral mistake on the part of the defendant-appellant. He agreed (R. 15) to the settlement as outlined by the trial court which did not include the additional limitation he contends was included.

There is no indication in the record of either error or abuse of discretion on the part of the trial court with respect to the manner in which the hearings and trial were conducted or with respect to the manner in which the judgment entry was signed and filed.

Accordingly, the judgment of the Court of Common Pleas, Division of Domestic Relations, is affirmed and this appeal is dismissed.

Subsequent to the hearings upon the merits, the plaintiff-appellee filed a motion with the court seeking an order granting her resonable attorneys fees for the services of counsel in the defense of this appeal. While pursuant to R.C. 3105.14 and Civil Rule 75, this court may, in its discretion, have jurisdiciton to grant such fees as expense money pending an appeal, the motion will be overruled since the order appealed from granted plaintiff-appellee both expense money and periodic alimony payments. That order has remained in effect whether or not it has been complied with by defendant-appellant. If plaintiff-appellee be entitled to expense money in addition to that previously awarded by the trial court, such question could best be determined by that court.

TROOP, P.J., and STRAUSBAUGH, J., concur.

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1971 TERM
To wit: April 7, 1971

Elizabeth Jane Holland,
Appellee,

vs.

James F. Holland,
Appellant.

No. 71-79
MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS for FRANKLIN County TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00 paid by Rankin M. Gibson.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
This day of 19
Clerk
Deputy

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1971 TERM
To wit: April 7, 1971

Elizabeth Jane Holland,
Appellee,
vs,
James F. Holland,
Appellant.

No. 71-79
APPEAL FROM THE
THE COURT OF APPEALS
for FRANKLIN County

This cause, here on appeal as of right from the Court of Appeals for FRANKLIN County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the----------appelle---recover from the----------appellant---its--------- costs herein expended; that a mandate be sent to the COMMON PLEAS COURT to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for FRANKLIN County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this day of 19
Clerk
Deputy

APPENDIX D

Fourteenth Amendment, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 3105.10, Revised Code:

The court of common pleas shall hear any of the causes of divorce or annulment charged in the petition and may, upon proof to the satisfaction of the court, pronounce the marriage contract dissolved and both of the parties released from their obligations.

Upon the granting of a divorce, on a petition or cross-petition, by force of such judgment, each party shall be barred of all right of dower in real estate situated within this state of which the other was seized at any time during coverture.

"Dower" as used in this section has the meaning set forth in section 2013.02 of the Revised Code.

APPENDIX E

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS

Elizabeth Jane Holland,
Plaintiff,

vs. Case No. 140,522

James F. Holland,
Defendant.

DECREE OF DIVORCE

This day this cause came on for hearing on the amended petition, of the plaintiff and the answer of the defendant, the defendant having been duly served with summons and a copy of the amended petition herein. The Court finds that the plaintiff, on the date of filing her petition, had been a resident of the State of Ohio for one year next preceding said date and was at that time a bona fide resident of Franklin County, and had resided in Franklin County for more than ninety (90) days immediately preceding the filing of her petition; that the parties hereto were married as set forth in the petition. The Court further finds that the following children were born of this marriage, to-wit: Joanne Frances Holland, born February 25, 1949; Kathryn Ann Holland, born October 22, 1950; James F. Holland II, born March 2, 1952; Patricia Ann Holland, born March 17, 1954; Elizabeth Ann Holland, born March 3, 1958; and Michael Francis Holland, born October 6, 1962. The Court further finds upon the evidence adduced that the defendant has been guilty of gross neglect of duty towards this plaintiff, and by reason thereof, plaintiff is entitled to a divorce as prayed for in her petition.

IT IS, THEREFORE, ordered, adjudged and decreed as follows:

1. That the marriage contract heretofore existing between the plaintiff and the defendant be, and the same hereby is,

dissolved, and both parties are released from the obligations of the same;

2. The custody of the six children born of the aforesaid marriage be and it hereby is granted to plaintiff, Elizabeth Jane Holland. The defendant shall have reasonable rights of visitation with said children, but defendant shall not enter the home of the plaintiff without the express consent of the plaintiff;

3. The defendant shall convey his undivided one-half (1/2) interest in the following described premises, subject to the existing mortgage, to the plaintiff;

> Situate in the County of Franklin, State of Ohio and in the City of Upper Arlington and bounded and described as follows:
>
> Being Lot Number Ten (10) in Block Number Four' Hundred Seventeen (417) of MANCHESTER PLACE ADDITION in the City of Upper Arlington, Franklin County, Ohio, as said lot is numbered and delineated upon the recorded plat thereof, of record in Plat Book 28, page 1, Recorder's Office, Franklin County, Ohio.
>
> Also known as 3848 Walhaven Road, Columbus, Ohio;

4. The defendant shall convey his entire interest in the following described premises to plaintiff;

> Situate in the County of Franklin, State of Ohio, and in the City of Columbus, and bounded and described as follows:
>
> Being Lot Number One (1) of ROSARY SUBDIVISION AMENDED, as the same is numbered and delineated upon the recorded plat thereof, of record in Plat Book 22, page 89, Recorder's Office, Franklin County, Ohio.
>
> Also known as 3482-84 Race Street, Columbus, Ohio;

5. The defendent shall transfer a Certificate of Title, free and clear of all liens, for the 1968 Cadillac, now in plaintiff's posssession to the plaintiff;

6. As a further property division, the defendant shall pay to the plaintiff the sum of Twenty Five Thousand ($25,000.00) Dollars, at her remarriage, or five (5) years from the date of this Decree, whichever is first, without interest;

7. The plaintiff shall have all furniture now at the premises known as 3848 Walhaven Road, Columbus, Ohio, except that the defendant shall receive the items appearing on the list attached hereto as Exhibit "A";

8. The defendant shall maintain any life insurance policies presently in existence and shall designate the plaintiff as beneficiary, and thereafter shall make no change in beneficiary;

9. As a further property division, the defendant shall make all payments upon the mortage of the premises referred to as 3848 Walhaven Road, Columbus, Ohio. If the plaintiff should remarry or sell said premises, the defendant shall continue to pay the ordinary payment that he would pay under the amortization and mortage schedule directly to the plaintiff. The defendant shall bring up to date the mortgage payments.

10. Defendant shall bring up to date the real estate taxes, and shall pay all real estate taxes, and shall maintain and keep in force the present insurance on the Walhaven premises so long as plaintiff remains unmarried and lives in the premises, and shall repair and maintain the Walhaven premises during the same period of time;

11. The defendant shall pay to the palintiff the arrearage, arising from the previous orders of this Court, as shown by the records of the Clerk of Court, brought current to the date of this Decree;

12. Defendant shall pay the back bills which were incurred prior to the filing of this action;

13. Defendant shall pay all medical and dental bills incurred prior to the filing of this action;

14. Defendant shall pay directly to the plaintiff, as alimony, the sum of One Thousand One Hundred and no/100 ($1,100.00) Dollars each month, beginning with the 1st day of the month of April, 1970. Plaintiff shall have the right to claim all children as dependents. These alimony payments shall cease upon remarriage of the plaintiff.

These alimony payments shall be reduced by One Hundred and no/100 ($100.00) Dollars per month as each child is emancipated, and emancipation means when each child ceases to be a full-time student, whether that be 22 years old or 18 years old.

15. Defendant shall pay the tuition for any children in a state-supported school, for their higher education.

16. During the period that defendant has any obligation to the plaintiff under this Decree, the defendant shall place all of the stock in Granville Development Corporation in trust for the purpose of securing these obligations. No further stock shall be issued by said corporation. So long as defendant makes payments in accordance with this Court Order, the trustees shall pay to defendant any and all income of this trust and the defendant shall have the full power to guide the investment of the money.

The Court reserves the right to invade the income or principal or to make any order with regard to the assets of the Corporation and trust in order to compel the payment of defendant's obligations set forth in this Decree, and the trustees shall not be permitted to pay over to the defendant any invasion of principal while these obligations still exist. The Court also reserves the power to release the defendant's stock from the trust, upon application of defendant, for cause shown that security is no longer necessary.

17. The defendant shall pay as expense money to the plaintiff the sum of Two Thousand Five Hundred and no/100 ($2,500.00) Dollars.

18. It is further ORDERED that the defendant shall pay all the costs herein, including costs of depositions, taxed at $, within five (5) days from the entry of this Decree, or execution be issued therefore.

/s/ J. W. Hill
Judge

APPROVED:

/s/ Harry Lewis
HARRY LEWIS
Attorney for Plaintiff

The original of this Decree was hand carried to the office of Robert E. Albright, Attorney for Defendant, on May 12, 1970, and as of May 20, 1970, has not been returned approved or disapproved.

LUCAS, PRENDERGAST, ALBRIGHT GIBSON, BROWN & NEWMAN
Attorneys for Defendant

EXHIBIT "A"

Personal property now located at 3848 Walhaven Road, Columbus, Ohio, which shall belong to the defendant, James F. Holland, and shall be made available to him upon the filing of this Entry.

All property used by the defendant in connection with his business, including but not limited to: desk; chair, filing cabinet, adding machine and related office equipment and supplies, a garden tractor, a Honda motorbike and hand tools. Splitting liquor 50-50.

The boat, trailer and accessories for said boat.

Defendant's war souvenirs such as pictures; guns, and bayonets.

APPENDIX F

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

Elizabeth Jane Holland,
Plaintiff-Appellee,

vs.

James F. Holland,
Defendant-Appellant.

Case No. 9883
ENTRY

On consideration of the record, assignments of error, briefs and arguments of counsel on questions of law, the court fails to find any error appearing on the record in the judgment and proceedings of the court below, prejudicial to the rights of appellant, and the judgment is therefore affirmed, at appellant's costs, and it is ordered that a mandate issue to the court below for enforcement of the judgment. The court certifies, however, that there was reasonable grounds for this appeal.

Plaintiff-Appellee's motion for an order granting reasonable attorneys fees is hereby overruled.

_____
Judge

_____
Judge

_____
Judge

APPROVED:

/s/ Harry Lewis
HARRY LEWIS
Counsel for Plaintiff-Appellee

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON, BROWN & NEWMAN

BY
Counsel for Defendant-Appellant

A copy of the foregoing Entry was delivered to the office of Robert E. Albright on the 23rd day of December, 1970, and has not been returned either approved or disapproved as of December 31, 1970.

SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

SUP. CT. U.S.
SEP 22 1971
E. ROBERT SEAVER, CLERK

No. 71-133

JAMES F. HOLLAND

Petitioner

v.

ELIZABETH JANE HOLLAND

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

GEORGE E. TYACK, ESQ.
and
HARRY LEWIS, ESQ.
8 East Broad Street
Columbus, Ohio 43215
Attorneys for Respondent

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON, BROWN & NEWMAN.
RANKIN M. GIBSON, ESQ.
42 East Gay Street
Columbus, Ohio 43215
Attorneys for Petitioner

Date

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 71-133

JAMES F. HOLLAND
Petitioner
v.
ELIZABETH JANE HOLLAND
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The Supreme Court of Ohio wrote no opinion. The Court of Appeals for Franklin County, Ohio, rendered a written decision on December 22, 1970 (Appendix A, infra, p. 7-11).

JURISDICTION

The jurisdictional requisites are adequately setforth in the petition.

QUESTION PRESENTED

Is the party against whom a divorce is granted after a full and complete evidentiary hearing on the merits of such divorce, denied his rights, privileges and property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States when a full and complete property

settlement arising out of said divorce and made a part of the court decree is agreed to by both parties and their attorneys in the presence of the court without an evidentiary hearing on said property settlement?

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the relevant constitutional and statutory provisions involved herein are contained herein (Appendix B, infra, p. 12-13). The relevant provisions are:

(a) The Fourteenth Amendment to the Constitution of the United States

(b) Ohio Revised Code Sections 3105.01, 3105.10, 3105.11, and 3105.17.

STATEMENT OF THE CASE

On February 18, 1969, Elizabeth Jane Holland, hereinafter called respondent, filed her petition in the Court of Common Pleas, (Division of Domestic Relations), Franklin County, Ohio, against James F. Holland, hereinafter called petitioner, alleging that she and the petitioner were married on May 1, 1948; and that six children, varying in ages from 6 to 20 years, were born as issue of the marriage; that the petitioner had been guilty of gross neglect of duty and extreme cruelty. Wherefore, the respondent prayed that she be awarded temporary and permanent alimony; that she be awarded custody of the children; and that she be awarded temporary and permanent support money and expense money.

Thereafter, on October 30, 1969, by leave of court, the respondent filed an amended petition making substantially the same allegations, but, in addition, alleging that the petitioner had entered into a series of agreements with various corporations for the purpose of placing the assets of specified corporations outside the reach of the respondent's request for alimony. The respondent, in her amended petition, asked that she be awarded an absolute divorce; that the agreements entered into

by the petitioner be set aside; that a constructive trust be imposed upon the funds derived from the sale or liquidation of the assets earned by the petitioner; that she receive temporary and permanent alimony, temporary and permanent custody of the children, and temporary and permanent support money for the children, as well as expense money.

On January 16, 1970, the petitioner answered respondent's amended petition admitting the marriage and that six children were born thereof. The petitioner, by his answer, denied all other allegations of the amended petition.

On March 18, 1970, the domestic relations proceeding initiated by the respondent was docketed for a hearing on the merits at 9:00 A.M. However, the trial court, after disposing of some preliminary matters in other cases, invited counsel for the parties into chambers to discuss and explore the possibility of settlement. These discussions between counsel for the parties continued in chambers with periodic conferences with their respective clients until approximately 3:00 P.M. It then appearing that there was agreement between the parties with respect to distribution of the property, the matters of alimony, custody of the children, and similar matters, the Court called the parties and their counsel together in the court library, at which time the Court, in the presence of a reporter, summarized the agreement reached by the parties. A copy of these proceedings are herein contained. (Appendix C, infra, p. 14-21). Following the recording of the agreement, the respondent herein then appeared in the open court with her witnesses and presented evidence to the court substantiating her claims that she should be entitled to the divorce and other relief as prayed for in her amended petition. The defendant failing to appear, after proper notice had been served upon he and his counsel, the court then in light of the evidence presented in open court granted the respondent the divorce as prayed for in her petition and further ordered that a decree be drawn in accordance with the property settlement as agreed to by the parties and counsel.

Several days later, petitioner submitted a form of decree to respondent which was not acceptable as it deviated from the court's opinion. Several drafts and counter-drafts were exchanged. Counsel for respondent on May 12, 1970, submitted his last draft of the decree to counsel for petitioner, who refused to approve or disapprove it. On May 20, 1970, eight days after this decree had been submitted to opposing counsel.

it was submitted to the trial judge, who signed it and had it journalized the same day (Appendix D, infra, p. 22-25). This decree accurately reflects the understanding of the parties and the opinion of the court as per the agreement reached by the parties in the chambers of the trial judge on March 18, 1970.

Petitioner filed a motion for a new trial which came on for oral hearing on July 22, 1970. The trial court found the motion to be without merit. The petitioner thereupon appealed to the Court of Appeals of Franklin County, Ohio. The intermediate appellate court, by decision of December 22, 1970 (Appendix A, infra, p. 7-11) finding neither error nor abuse of discretion on the part of the trial court with respect to the manner in which the hearings and trials were conducted or with respect to the manner in which the decree was signed and filed, affirmed the judgment of the Court of Common Pleas, Division of Domestic Relations. The appellate court's judgment was then journalized on January 7, 1971. (Appendix E, infra, p. 26, 27).

On April 7, 1971, the Supreme Court of Ohio overruled the petitioner's motion to certify and dismiss, sua sponte, the petitioner's appeal of right in the aforementioned case. (Appendix F, infra, p. 28).

ARGUMENT

PETITIONER HAS NOT BEEN DENIED ANY RIGHT OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Petitioner's claim is that he has a right to a full evidentiary hearing on the issues involved in a property settlement arising out of a decree of divorce. He claims that unless the parties are in full agreement as to any property settlement, the court in session must hear evidence concerning a settlement before it can make a final decree. Petitioner cites in his brief many Ohio cases as well as cases from other jurisdictions which he claims gives him this right. However, by a proper interpretation of these cases all petitioner is guaranteed is a right to an evidentiary hearing on the grounds for divorce. Petitioner had this evidentiary hearing in the trial court but chose not to attend. (Appendix G, infra, p. 29-32).

Under Ohio Revised Code Sections 3105.01, 3105.10, 3105.11 and 3105.17 the grounds for granting of a divorce or

alimony and the statutory guarantees of a hearing are provided for. All that is required is a hearing on the issues of the divorce or alimony. The grounds for a granting of divorce or alimony are the same. Petitioner was given a full evidentiary hearing in open court; at that hearing respondent appeared and presented evidence supporting her petition for divorce and alimony. Petitioner chose not to attend and therefore a decree of divorce was granted against him. He cannot now claim that he has been denied due process of law simply because there was not another evidentiary hearing on the issues involved in the property settlement arising out of the decree of divorce. Petitioner could have, if he so desired, appeared and presented evidence concerning the issues of the property settlement in the divorce hearing.

Irrespective of what petitioner could have done there is no right to a evidentiary hearing on the issues involved in a property settlement necessary to satisfy the requirements of due process of law, especially where the parties in the presence of the court and with the advice of competent counsel, agree to a fair property settlement.

Petitioner claims that if the parties do not agree to the property settlement, the court cannot make this settlement a part of its decree unless an opportunity is afforded to the disagreeing party to present evidence on said property settlement in open court. Again petitioner had such an opportunity. He could have submitted to the trial court his own version of the property settlement before the divorce decree was finalized. A hearing could then have followed. He chose not to do so. How can petitioner now claim that he has been denied due process of law?

Due process of law does not require a hearing or trial of every dispute that may arise in a civil proceeding. Justic Brandeis in the case of *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 (1930) stated in his opinion:

> "Whether acting through its judiciary, or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, *unless there is, or was, afforded to him some real opportunity to protect it.*" (emphasis added)

Further this Court, in the case of *Goltra v. Weeks*, 271 U.S. 536, 46 S. Ct. 613 (1925) said in effect "that if there has been a full hearing or opportunity for a hearing there is no necessary violation of the guarantee of due process".

In the present case petitioner had real opportunities to protect his rights. He could have appeared at the trial on the merits of the divorce action. He failed to do so. He could have submitted his own version of the property agreement to the trial court before the final decree was entered. He failed to do so. Petitioner has not been denied due process of law under the Fourteenth Amendment to the Constitution of the United States because of the opportunities to be heard afforded him.

A full evidentiary hearing on the issues involved in a property settlement even where there is disagreement between the parties would not be as fair a method to either party as the negotiating sessions which were held in this case. To reach a fair settlement there must be give and take between the parties and their counsel. Negotiating sessions like those held in this case are the only realistic way that this "give and take" process can take place. An in-court trial governed by the rules of evidence would tend to stiffle the "give and take process" and result in hardships to both parties. In today's society the courts are already overburdened. Any procedure by which fair and just results can be reached without the necessity of a full fledged trial is of benefit to society. A negotiating session such as the one held in this case is just such a procedure. Both parties, their attorneys, and the trial judge were present. Each party had the opportunity to state his position fully. In the end both parties and their counsel agreed to the proposed property settlement. A full hearing on the merits of the divorce action was then held in open court. What more could either party ask? Without question petitioner has been afforded all the rights and opportunities that the phrase due process of law includes.

CONCLUSION

The trial court, the appellate court, and the Ohio Supreme Court have reviewed this case and each has reached the conclusion that petitioner has received a fair trial as guaranteed by due process of law.

For the reasons stated in the foregoing argument respondent prays that the petition for a writ of certiorari be denied.

APPENDIX A

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

Elizabeth Jane Holland,
Plaintiff-Appellee,

vs.

No. 9883

James F. Holland,
Defendant-Appellant.

DECISION
Rendered on December 22, 1970

MR. HARRY LEWIS,
8 East Broad Street,
Columbus, Ohio 43215,
For Plaintiff-Appellee.

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON,
BROWN & NEWMAN,
MR. RANKIN M. GIBSON and
MR. ROBERT E. ALBRIGHT,
42 East Gay Street,
Columbus, Ohio 43215;
For Defendant-Appellant.

---

1. It is not error for a court to permit an amended petition (or complaint) to be filed changing an action from one for alimony only to one for divorce and alimony where there is service upon the defendant upon the amended petition and the case proceeds to trial upon the amended petition.

2. An in-court agreement of the parties concerning division of property and alimony adopted by the court as its judgment thereon is enforceable by the court and may be incorporated

into the judgment entry even in the absence of an agreement in writing, or an approval of the judgment entry, signed by a party or his attorney,

3. Such an in-court settlement agreement is enforceable by the court even where one of the parties to such settlement intended to include additional provisions or limitations which were neither included in the settlement agreement nor expressed by such party at the time of making such agreement.

WHITESIDE, J.

This is an appeal upon questions of law from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, granting a divorce to the plaintiff-appellee and awarding alimony to plaintiff-appellee, both by division of property and periodic payments.

The defendant-appellant assigns two assignments of errors as follows:

"1. The trial court erred in permitting the plaintiff to convert a cause of action for alimony only into a cause of action for divorce and alimony by amendment of her petition.

"2. The trial court erred in journalizing the decree of divorce on May 20, 1970, without affording the defendant a hearing when the plaintiff and defendant were not in agreement on the contents of the decree journalized."

With regard to the first assignment of error, it appears that plaintiff-appellee originally on February 18, 1969, filed a petition for alimony only. Defendant-appellant filed an answer thereto on or about August 14, 1969. By entry of October 30, 1969, plaintiff-appellee was granted leave to file an amended petition seeking a divorce. The amended petition seeking a divorce and alimony was duly filed on October 30, 1969.

The first attempt to obtain service upon defendant-appellant upon the amended petition was unsuccessful. An alias summons was issued and defendant-appellant was served upon the

amended petition on December 2, 1969. Defendant-appellant filed an answer to the amended petition on January 16, 1970. Essentially, therefore, the first assignment of error is predicated upon a contention that it is prejudicial error to permit an amendment to a petition to be filed changing an action from one for alimony only to one for divorce and alimony even when such amended petition is filed before trial, the defendant is served with summons thereof, and files and answer thereto.

Defendant-appellant relies upon the cases of *Hiler vs. Hiler*, 14 Ohio App. 174 and *Thompson vs. Thompson*, 42 Ohio App. 164. In the *Hiler* case the amendment was made after decree rather than before trial. In the *Thompson* case the amendment was made after trial but before decree. At page 166 of the *Thompson* case the court therein distinguished the instant situation as follows:

> "It is next suggested that the case could be considered upon the amended petition as an original petition, since personal service was had on the defendant and all the original allegations were incorporated therein; that the mere designation 'Amended Petition' should not prevent the consideration of the pleading as an original petition.
>
> "We are of opinion that this might be done, and, had the case been tried on the amended petition as an original petition, no prejudice would have resulted. But according to the record, there has never been a trial upon the amended petition. The trial was had on the original petition. Thirty-six days later, no decree having been rendered, at the suggestion of the court that amended petition was filed. Some months later, without further hearing, a decree was placed of record. We have, therefore, a decree entered in one lawsuit based presumably upon the evidence adduced in another lawsuit."

In this case, the trial was upon the amended petition. Furthermore, the defendant-appellant did not object to the filing of the amended petition or to the granting of leave to file same, but merely filed a general denial thereto. Defendant-appellant raises this question for the first time on appeal. This court finds that there was no prejudicial error on the part of the trial court in permitting the amended petition to be filed changing the action from one for alimony only to one for divorce and alimony and proceeding to trial upon the amended petition. Therefore, the first assignment of error is not well taken.

With regard to the second assignment of error, it appears that a conference was held between the court, the parties, and their attorneys prior to trial at which conference an agreement was reached with regard to division of property and alimony. The defendant-appellant now contends that his understanding of this agreement differs from that of the court and the plaintiff-appellee.

From the record of the hearing upon the motion for new trial, it appears that following the conference, a trial was held upon the merits of the amended petition at which the plaintiff-appellee persented evidence but at which the defendant-appellant did not appear at all, (R. 17-20). Apparently no court reporter was present at this hearing upon the merits, and, in any event, there is no bill of exceptions before this court with regard to the trial on the merits.

Subsequently, a journal entry was duly filed without approval of counsel for defendant-appellant but with a notation that it had been submitted to counsel for defendant-appellant for approval but had not been approved. It appears (R. 22) that the basic difference between the "understanding" of defendant-appellant and that of the court and plaintiff-appellee was whether or not the alimony payments were to continue for a period of only five years or were to be lifetime alimony ceasing only upon remarriage of the plaintiff-appelle.

There is also in the bill of exceptions a transcript of preceedings on March 18, 1970, which appears to be the conclusion of the conference during which the court reviewed the settlement agreed to by the parties and the parties specifically agreed to the terms as set forth by the court, (R. 2-15). There is no indication whatsoever therein that the alimony payments were to continue only for a period of five years.

The trial court found that the journal entry correctly reflected the agreement of the parties regarding property settlement and alimony payments made before the court, (R. 27, 28, 30). This agreement was adopted by the court and made a part of the judgment of the court (R. 2).

A distinction may be made between extra-judicial settlements and a settlement made in court. Defendant-appellant contends that in both instances such agreement can be evidenced only by a judgment entry signed by counsel for all parties. In this case,

the settlement was made before the court and the court adopted the settlement as its judgment as to division of property and alimony. Under such circumstances, there was no need for any writing signed by defendant-appellant or his attorney to evidence the terms and conditions of the settlement. This is especially true, where, as here, the agreement was read into the record.

It would appear from the bill of exceptions that the judgment entry correctly reflected that to which the parties agreed. Defendant-appellant contends that the judgment entry does not reflect what he thought he was agreeing to. If there were a mistake as to the terms of the agreement, it was a unilateral mistake on the part of the defendant-appellant. He agreed (R. 15) to the settlement as outlined by the trial court which did not include the additional limitation he contends was included.

There is no indication in the record of either error or abuse of discretion on the part of the trial court with respect to the manner in which the hearings and trial were conducted or with respect to the manner in which the judgment entry was signed and filed.

Accordingly, the judgment of the Court of Common Pleas, Division of Domestic Relations, is affirmed and this appeal is dismissed.

Subsequent to the hearings upon the merits, the plaintiff-appellee filed a motion with the court seeking an order granting her resonable attorneys fees for the services of counsel in the defense of this appeal. While pursuant to R.C. 3105.14 and Civil Rule 75, this court may, in its discretion, have jurisdiciton to grant such fees as expense money pending an appeal, the motion will be overruled since the order appealed from granted plaintiff-appellee both expense money and periodic alimony payments. That order has remained in effect whether or not it has been complied with by defendant-appellant. If plaintiff-appellee be entitled to expense money in addition to that previously awarded by the trial court, such question could best be determined by that court.

TROOP, P.J., and STRAUSBAUGH, J., concur.

APPENDIX B

Fourteenth Amendment, United States Constition:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

§ 3105.01 Grounds for divorce. (GC§ 8003-1)

The court of common pleas may grant divorces for the following causes:

(A) Either party had a husband or wife living at the time of the marriage from which the divorce is sought;

(B) Willful absence of the adverse party for one year;

(C) Adultery;

(D) Impotency;

(E) Extreme cruelty;

(F) Fraudulent contract;

(G) Any gross neglect of duty;

(H) Habitual drunkenness;

(I) Imprisonment of the adverse party in a state or federal penal institution under sentence thereto at the time of filing the petition;

(J) Procurement of a divorce without this state, to a husband or wife, by virtue of which the party who procured it is released from the obligations of the marriage, while such obligations remain binding upon the other party.

§ 3105.10 Answer, hearing, and judgment (GC§ 8003-11)

The court of common pleas shall hear any of the causes of divorce or annulment charged in the petition and may, upon proff to the satisfaction of the court, pronounce the marriage contract dissolved and both of the parties released from their obligations.

Upon the granting of a divorce, on a petition or cross-petition, by force of such judgment, each party shall be barred of all right of dower in real estate situated within this state of

which the other was seized at any time during coverture.

"Dower" as used in this section has the meaning set forth in section 2013.02 of the Revised Code.

§ 3105.11 Testimony. (GC § 8003-12)

A judgment for divorce or for alimony shall not be granted upon the testimony or admissions of a party unsupported by other evidence. No admission shall be received which the court of common pleas has reason to believe was obtained by fraud, connivance, coercion, or other improper means. The parties, notwithstanding their marital relation, shall be competent to testify in actions and proceedings under sections 3105.01 to 3105.21, inclusive, of the Revised Code, to the same extent that any other witness might.

§ 3105.17 Grounds for alimony. (GC § 8003-18)

Either party to the marriage may file a petition for divorce or for alimony, and when filed the other may file a cross-petition for divorce or for alimony. The court of common pleas may grant alimony on a petition or cross-petition for the following causes:

(A) Adultery;
(B) Any gross neglect of duty;
(C) Abandonment without good cause;
(D) A separation in consequence of ill treatment by the adverse party;
(E) Habitual drunkenness;
(F) Imprisonment of the adverse party in a state or federal penal institution under sentence thereto at the time of filing the petition.

APPENDIX C

IN THE COURT OF COMMON PLEAS, OF FRANKLIN COUNTY, OHIO DIVISION OF DOMESTIC RELATIONS

Elizabeth Jane Holland,
Plaintiff,
vs. No. 140, 522
James F. Holland,
Defendant.

PROCEEDINGS

Before Honorable John Hill, Judge, on Wednesday, March 18, 1970.

APPEARANCES:

Mr. Harry Lewis and Mr. Harry R. Paulino,
On behalf of the Plaintiff.

Messrs. Lucas, Prendergast, Albright, Gibson, Brown & Newman, by Mr. Robert E. Albright and Mr. Rankin M. Gibson,
On behalf of the Defendant.

Wednesday Afternoon Session, March 18, 1970

THE COURT: It is the Court's understanding that you people have arrived at an agreement to settle your property rights and support and custody of your children and questions of alimony. I worked with the attorneys all morning, and they have been back and forth to each of you. I want to make this agreement a part of the court order, and I will adopt this as the order that I intend to make in this case.

I am of the opinion, of course, that if you arrive at an

agreement of your own it is something that you can live with better than anything I might do. You can see the difficulty that I would have also in distributing the property belonging to you: and you are the ones that should arrive at an agreement. I just try to get the negotiation going, but when I adopt this as my court order then it is my order and it can't be altered after that. It is binding and just like any other court order. So, I am going to run through some of the things that I remember in this, and then the attorneys can fill me in. I want you folks to listen because I am going to ask you when I get done here if this is what you agreed to.

Now, first of all, it is my understanding that there is going to be a divorce to Mrs. Holland on the grounds of gross neglect of duty. Mrs. Holland is to get custody of all six children, and Mr. Holland has agreed to pay to Mrs. Holland the sum of $1100 per month, which is for alimony. Mrs. Holland will support the children, including all the children who are in college, and she will be paying income tax on this money, whatever tax there is to pay. She can claim them as dependents, all six children, until these children are emancipated, which in this particular case would mean when they cease to be full-time students, whether that be 22 years old of 18 years old. When they are emancipated, the alimony will be reduced by $100 a month as each child is emancipated.

Now, we also have the question of the residence property. The residence property will be – that is on Walhaven – will be awarded to Mrs. Holland. Mr. Holland is to pay the mortgage payments until the same is paid completely. He is to pay the taxes and insurance on the property and the payment of the mortgage payment is in the nature of a property settlement. Therefore, these mortgage payments will continue until the amount is paid for even if Mrs. Holland should remarry or if the property should be sold. If she should sell the property, Mr. Holland should continue to pay the ordinary payment that he would pay under the amortization and mortgage schedule, make those payments to Mrs. Holland. Mr. Holland is to maintain the property for her during this time as long as she is unmarried and living in the property, of course. Mrs. Holland is also to receive the one-third interest in the twin single – What is that address?

MR. HOLLAND: 3482 Race Street..

THE COURT: So, that will be placed, then, as I understand it, in Mrs. Holland's name and her mother's name, if that is

correct.

MR. ALBRIGHT: What about the insurance?

THE COURT: The insurance on the house, yes. I think we mentioned that. Well, we will mention it again. He is to pay the insurance on the real estate.

MR. HOLLAND: Well, are we speaking of Walhaven?

THE COURT: Walhaven only, that is right.

Mrs. Holland is to receive all of the furniture and personal property on the premises at Walhaven except for certain items which have been listed and agreed to by the attorneys. This includes basically all the items which Mr. Holland uses in connection with his business and includes a garden tractor that is there, a Honda motorbike, and some hand tools. In addition to that, he is to receive these items which are simply personal to him and to include all of your war souvenirs and guns and bayonets and all that. Now, that does not include, as I understand the discussion between the parties here, maybe a ring or something that your wife has even though it might be a war souvenir. We don't consider those types of things war souvenirs. We are talking, as I understand it, guns and bayonets and regular GI issue from our Government or some other government.

MR. HOLLAND: We are speaking of the things I brought home from overseas?

THE COURT: Yes.

MR. HOLLAND: Silver and everything?

THE COURT: Well, we are talking about the –

MR. HOLLAND: I have a hammered silver tea service and things.

THE COURT: It is my understanding she is to receive the silver tea set. The things you have used all these years in the household as such, and that was discussed in my office. Is that right, Mr. Albright?

MR. ALBRIGHT: Yes, sir.

THE COURT: It is not easy to decide these things, as I know. You have to part with some of these things, of course. Divorce works this way.

MR. HOLLAND: I would consider that as my personal items.

THE COURT: Really, all of this you would consider as your personal items, I assume. You built this house. It is in the same nature, you know what I mean, what I am talking about, your personal items. I am talking about your shaving equipment, watches, rings that you wear, and things like that. But we will

give you an opportunity, if you want, to talk about that further.

In addition to that, Mr. Holland is to give to Mrs. Holland $25,000 payable at the time she remarries or in five years, whichever should be the sooner. There is to be no interest on this obligation, and it is once again in the nature of a property settlement.

Mr. Holland is to pay the arrearages that are now due in the present court order, the court costs in this action, $2500 as expense money.

MR. ALBRIGHT: The payment of the alimony part would cease if she remarries?

THE COURT: Right. It will cease when she remarries.

MR. LEWIS: No problem. That is automatic.

THE COURT: The other thing that we covered, Mr. Holland is to pay the tuition for the children in the State-supported institution – or school, rather, for their higher education.

MR. LEWIS: And the back bills.

THE COURT: And Mr. Holland is to pay the back bills which were incurred prior to the inception of the divorce action and those medical – that is prior to the time your wife filed for divorce, if there are any bills that are due.

MR. HOLLAND: I don't understand that at all.

MR. ALBRIGHT: Let me tell it as I understand it. That is for the mortgage payments and the real estate taxes and the –

THE COURT: You are to bring up to date the mortgage payments and the real estate taxes and the – if there were any bills prior to the time you and your wife separated. Now, there probably aren't any, but you would know that if there were.

MR. HOLLAND: What does the arrearage consist of – bills?

THE COURT: No, the arrearage is the support order that – this temporary order that we had in court. You understand, you were supposed to pay so much a month.

MR. HOLLAND: We are speaking of paying that money so she can pay these bills or speaking of the support and bills, or what?

THE COURT: That is why I distinguished between those bills which were made – any bills that were made while this action was pending now other than the – As I understand it, there *is a dental bill for one of the children.*

MR. LEWIS: Dental bill.

THE COURT: That should be yours to pay. But the other –

any bills she made while this action was pending are hers to pay. They are hers to pay. You are only obligated to pay her the money that you were supposed to pay her during this period of time. Any bills prior to the time this action was instituted you are to pay, and there may not be any.

MR. HOLLAND: Let's determine if there are.

THE COURT: Do you know of any?

MRS. HOLLAND: No

THE COURT: Do you know of any?

MR. ALBRIGHT: No.

THE COURT: Do you know of any, Mr. Holland?

MR. HOLLAND: No.

THE COURT: Then, I take it there are none. The only reason we get into this is so that if someone comes up with a bill that is a year, year and a half old, then there is a question of who is to pay it.

Mrs. Holland is to receive the 1968 Cadillac automobile which is now in her possession. Mr. Holland is to receive the boat and the trailer and accessories for the boat that is at the residence real estate.

MR. HOLLAND: I have a question. We haven't brought up my desk and chair.

THE COURT: That is on the list you are to get, the desk and chair and everything else that is in connection with your business, filing cabinets, adding machine, anything like that that you have there at the home that you use in connection with your business you are to get according to this list we have and by the agreement we have.

MR. HOLLAND: I think we are narrowing down to the point, and this I don't understand, is things that I purchased, say, when I was in the Service or personal things.

THE COURT: Well, I think –

MR. HOLLAND: I don't follow why I would not get those.

THE COURT: Now, you list those things for your attorney particularly what they are, then we will consider those items one by one. We are down to that point where we should consider those items one by one. As I indicated to you, there is a lot of give and take in these things, and I'm only trying to –

MR. HOLLAND: Well, Your Honor, I don't want anything from my wife that she brought into the marriage, and I can't understand why she would want the things that I brought in, these things I acquired before I even met her.

THE COURT: I understand, but I also understand that you will be leaving this marriage with a bunch of four-family apartments, half interest in so many acres on Granville Road. You will be leaving this marriage with a lot of things that were accumulated during the marriage that she helped to accumulate, so there again you see it isn't on the basis of who just paid for what. The only – I think if you ask me why I have made this determination and why your attorneys have agreed to it, a silver tea service that she had sitting on her buffet, we will say, for twenty years, I am not going to tell her to take it off, or I am not going to tell her to take a ring off her finger which she has worn for twenty years. Those are the kind of things we are talking about.

MR. HOLLAND: I certainly wouldn't ask her for that.

THE COURT: I have in the same respect no hesitancy whatsoever in recommending to the attorneys that you take the boat. That is something that would be more, you know, something you would use.

MR. HOLLAND: We didn't mention my pool table, either.

MR. LEWIS: Your Honor, I was – It is getting ridiculous. And I would say to the Court I was over there to interview these people, and I shot some pool with his young son, Mike, and he is a very capable pool shooter.

THE COURT: I – These things are difficult, and we are not going to have an easy time of it. Sometimes you just have to say what I said all the personal items in the property except these items that I said you could have. Now, you are not obligated to agree to this, and when I get finished here I am going to ask you if you agree to it, and if you say no we are going to hear the case in toto then.

These really aren't my decisions entirely, I have asked your attorney. He has had to give a lot here today and he has had to give a lot, and they have been running in and out. And all I know is that we have tried to arrive at something that I thought you could accept. Now, if you won't accept, I will ask you to say so when we are all finished.

Is there anything else? Now, the one other item is in order to secure all the obligations that you have here including life insurance, which we mentioned, whatever like insurance policies we have presently we expect Mrs. Holland to be made the beneficiary at this time, and she probably is the beneficiary. I expect you to maintain those policies.

Now, the Court is going to order that you place all of the stock in Granville, Incorporated, in trust to secure these obligations so that that property will be secured, so that the child support and house payments and all that sort of thing are paid. The trustees, of course, should have the right to pay over to you any and all income of this trust, and you should have the full power to guide the investment of the money and that sort of thing, which you have always done. He should be permitted to pay over to you all of the income from this trust as long as you are meeting your obligations under this court order. Should you not meet those obligations, then the income or the principal of the trust could be invaded to meet those obligations and the trustee should not be permitted to pay over to you any invasion of principal of the trust while these obligations still exist.

I think the Court will reserve the right, if these trusts – This is one thing we haven't discussed, but I think that it follows logically. The Court should reserve the right to permit the invasion of the principal of this trust if it was in the sound discretion of the Court if the obligations – of course, when the child support has been reduced down to the point where you don't have near the obligations to pay for the mortgage and that sort of thing, we may – The Court should reserve the right to release to you a substantial portion of the principal of this trust. In other words, we get down to where there is not – we don't need –

MR. HOLLAND: Your Honor –

THE COURT: If we don't need a quarter of a million dollars in trust property, why, there is no sense in the Court tying up your property more than is needed to secure this obligation. But that would be by court order. I think that should be provided in the trust agreement, I think, that the Court is going to direct it. Have your attorney and the wife's attorney draw up a trust agreement and bring it to this Court and the Court will determine if it meets the needs of what we have in mind.

Now, I think we'd better stop right now, and if there's anything else in this part –

MR. LEWIS: No, Your Honor, I believe the Court has covered everything.

THE COURT: Why don't we stop now, and I will give you each a few minutes to talk to your attorneys.

MR. ALBRIGHT: All right.

THE COURT: I don't want to discuss Mr. Holland's special items with you, and the only reason I don't is because your attorney represents you in toto. He is trying. He is going to have to point out to you, "Okay, we got to give a little here, but look what I got hid over here, or something that I am getting for you," or something. I think it is his obligation to tell you what is a good deal and what isn't a good deal. Then, I am going to come back in a few moments – five minutes, and I'm going to ask you if you agree to accept these terms. If you tell me yes, then the Court will order it, and we will go from there.

Al right?

MR. HOLLAND: Okay.

(Thereupon, a recess was taken.)

THE COURT: All right.

MR. ALBRIGHT: We have an addition to give the Court here.

THE COURT: All right.

MR. HOLLAND: Tell you what, Bob, on that other one, why don't you in all fairness let her keep both of them.

MR. ALBRIGHT: All right. She can keep all the silver.

There is a tablecloth he brought from China, a knife-and-fork set, half of the chess set. He already has part of it. And some scarves; and although he doesn't drink, they are splitting the liquor down the center – the attorneys are.

MR. HOLLAND: I think there is $500 worh.

MR. LEWIS: Whatever is in the house that has alcohol in it.

MR. ALBRIGHT: On the shelf down there.

THE COURT: That is agreeable to you, Mrs. Holland?

MRS. HOLLAND: Yes.

THE COURT: Is that agreeable to you, Mr. Holland?

MR. HOLLAND: Everything except the tea set I didn't get out of that, it is agreeable.

MR. ALBRIGHT: It is either agreeable or it is not.

MR. HOLLAND: It is.

THE COURT: It is agreeable to both parties, then, all right.

We will then make this a part of the Court's order; and that is all.

MR. LEWIS: Thank you.

Thereupon, at 4:30 o'clock, P.M., Wednesday, March 18, 1970, the hearing was closed.

APPENDIX D

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS

Elizabeth Jane Holland,
Plaintiff,

vs. Case No. 140,522

James F. Holland,
Defendant.

DECREE OF DIVORCE

This day this cause came on for hearing on the amended petition, of the plaintiff and the answer of the defendant, the defendant having been duly served with summons and a copy of the amended petition herein. The Court finds that the plaintiff, on the date of filing her petition, had been a resident of the State of Ohio for one year next preceding said date and was at that time a bona fide resident of Franklin County, and had resided in Franklin County for more than ninety (90) days immediately preceding the filing of her petition; that the parties hereto were married as set forth in the petition, The Court further finds that the following children were born of this marriage, to-wit: Joanne Frances Holland, born February 25, 1949; Kathryn Ann Holland, born October 22, 1950; James F. Holland II, born March 2, 1952; Patricia Ann Holland, born March 17, 1954; Elizabeth Ann Holland, born March 3, 1958; and Michael Francis Holland, born October 6, 1962. The Court further finds upon the evidence adduced that the defendant has been guilty of gross neglect of duty towards this plaintiff, and by reason thereof, plaintiff is entitled to a divorce as prayed for in her petition.

IT IS, THEREFORE, ordered, adjudged and decreed as follows:

1. That the marriage contract heretofore existing between the plaintiff and the defendant be, and the same hereby is,

dissolved, and both parties are released from the obligations of the same;

2. The custody of the six children born of the aforesaid marriage be and it hereby is granted to plaintiff, Elizabeth Jane Holland. The defendant shall have reasonable rights of visitation with said children, but defendant shall not enter the home of the plaintiff without the express consent of the plaintiff;

3. The defendant shall convey his undivided one-half (1/2) interest in the following described premises, subject to the existing mortgage, to the plaintiff;

Situate in the County of Franklin, State of Ohio and in the City of Upper Arlington and bounded and described as follows:

Being Lot Number Ten (10) in Block Number Four Hundred Seventeen (417) of MANCHESTER PLACE ADDITION in the City of Upper Arlington, Franklin County, Ohio, as said lot is numbered and delineated upon the recorded plat thereof, of record in Plat Book 28, page 1, Recorder's Office, Franklin County, Ohio.

Also known as 3848 Walhaven Road, Columbus, Ohio;

4. The defendant shall convey his entire interest in the following described premises to plaintiff;

Situate in the County of Franklin, State of Ohio, and in the City of Columbus, and bounded and described as follows:

Being Lot Number One (1) of ROSARY SUBDIVISION AMENDED, as the same is numbered and delineated upon the recorded plat thereof, of record in Plat Book 22, page 89, Recorder's Office, Franklin County, Ohio.

Also known as 3482-84 Race Street, Columbus, Ohio;

5. The defendent shall transfer a Certificate of Title, free and clear of all liens, for the 1968 Cadillac, now in plaintiff's posssession to the plaintiff;

6. As a further property division, the defendant shall pay to the plaintiff the sum of Twenty Five Thousand ($25,000.00) Dollars, at her remarriage, or five (5) years from the date of this Decree, whichever is first, without interest;

7. The plaintiff shall have all furniture now at the premises known as 3848 Walhaven Road, Columbus, Ohio, except that the defendant shall receive the items appearing on the list attached hereto as Exhibit "A";

8. The defendant shall maintain any life insurance policies presently in existence and shall designate the plaintiff as beneficiary, and thereafter shall make no change in beneficiary;

9. As a further property division, the defendant shall make all payments upon the mortage of the premises referred to as 3848 Walhaven Road, Columbus, Ohio. If the plaintiff should remarry or sell said premises, the defendant shall continue to pay the ordinary payment that he would pay under the amortization and mortage schedule directly to the plaintiff. The defendant shall bring up to date the mortgage payments.

10. Defendant shall bring up to date the real estate taxes, and shall pay all real estate taxes, and shall maintain and keep in force the present insurance on the Walhaven premises so long as plaintiff remains unmarried and lives in the premises, and shall repair and maintain the Walhaven premises during the same period of time;

11. The defendant shall pay to the palintiff the arrearage, arising from the previous orders of this Court, as shown by the records of the Clerk of Court, brought current to the date of this Decree;

12. Defendant shall pay the back bills which were incurred prior to the filing of this action;

13. Defendant shall pay all medical and dental bills incurred prior to the filing of this action;

14. Defendant shall pay directly to the plaintiff, as alimony, the sum of One Thousand One Hundred and no/100 ($1,100.00) Dollars each month, beginning with the 1st day of the month of April, 1970. Plaintiff shall have the right to claim all children as dependents. These alimony payments shall cease upon remarriage of the plaintiff.

These aiimony payments shall be reduced by One Hundred and no/100 ($100.00) Dollars per month as each child is emancipated, and emancipation means when each child ceases to be a full-time student, whether that be 22 years old or 18 years old.

15. Defendant shall pay the tuition for any children in a state-supported school, for their higher education.

16. During the period that defendant has any obligation to the plaintiff under this Decree, the defendant shall place all of the stock in Granville Development Corporation in trust for the purpose of securing these obligations. No further stock shall be issued by said corporation. So long as defendant makes payments in accordance with this Court Order, the trustees shall pay to defendant any and all income of this trust and the defendant shall have the full power to guide the investment of the money.

The Court reserves the right to invade the income or principal or to make any order with regard to the assets of the Corporation and trust in order to compel the payment of defendant's obligations set forth in this Decree, and the trustees shall not be permitted to pay over to the defendant any invasion of principal while these obligations still exist. The Court also reserves the power to release the defendant's stock from the trust, upon application of defendant, for cause shown that security is no longer necessary.

17. The defendant shall pay as expense money to the plaintiff the sum of Two Thousand Five Hundred and no/100 ($2,500.00) Dollars.

18. It is further ORDERED that the defendant shall pay all the costs herein, including costs of depositions, taxed at $ within five (5) days from the entry of this Decree, or execution be issued therefore.

/s/ J. W. Hill
Judge

APPENDIX E

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Elizabeth Jane Holland,
Plaintiff-Appellee,

vs.

James F. Holland,
Defendant-Appellant.

Case No. 9883
ENTRY

On consideration of the record, assignments of error, briefs and arguments of counsel on questions of law, the court fails to find any error appearing on the record in the judgment and proceedings of the court below, prejudicial to the rights of appellant, and the judgment is therefore affirmed, at appellant's costs, and it is ordered that a mandate issue to the court below for enforcement of the judgment. The court certifies, however, that there was reasonable grounds for this appeal.

Plaintiff-Appellee's motion for an order granting reasonable attorneys fees is hereby overruled.

_____
Judge

_____
Judge

_____
Judge

APPROVED:

/s/ Harry Lewis
HARRY LEWIS
Counsel for Plaintiff-Appellee

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON, BROWN & NEWMAN

BY
Counsel for Defendant-Appellant

A copy of the foregoing Entry was delivered to the office of Robert E. Albright on the 23rd day of December, 1970, and has not been returned either approved or disapproved as of December 31, 1970.

APPENDIX F

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1971 TERM
To wit: April 7, 1971

Elizabeth Jane Holland,
Appellee,
vs,
James F. Holland,
Appellant.

No. 71-79
APPEAL FROM THE
THE COURT OF APPEALS
for FRANKLIN County

This cause, here on appeal as of right from the Court of Appeals for FRANKLIN County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the----------appelle---recover from the----------appellant---its---------- costs herein expended; that a mandate be sent to the COMMON PLEAS COURT to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for FRANKLIN County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this day of 19
Clerk
Deputy

APPENDIX G

**IN THE COURT OF COMMON PLEAS,
OF FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS**

Elizabeth Jane Holland,
Plaintiff,
vs. **Case No. 140,522**
James F. Holland,
Defendant.

BILL OF EXCEPTIONS

APPEARANCES:

Mr. Harry Lewis and Mr. Harry R. Paulino,
On behalf of the Plaintiff.

Messrs. Lucas, Prendergast, Albright, Gibson, Brown & Newman, by Mr. Robert E. Albright and Mr. Rankin Gibson;
On behalf of the Defendant.

BE IT REMEMBERED that on the trial of the above-entitled cause at the January Term, 1970, of the Common Pleas Court of Franklin County, Ohio, before Honorable John W. Hill, Judge, the Plaintiff and Defendant to maintain the issues on their part to be maintained, offered and introduced in testimony on their behalf the following evidence, to-wit:

**Wednesday Morning Session,
July 22, 1970**

THE COURT: Are you ready to proceed, Mr. Albright?
MR. ALBRIGHT: Yes, your Honor.

THE COURT: Mr. Lewis, are you ready to proceed?

MR. LEWIS: Yes.

THE COURT: Mr. Albright, do you want to be heard at this time?

MR. ALBRIGHT: Mr. Gibson is going to.

MR. GIBSON: As I understand it the decree in this case was filed on May 20th, 1970, and it is a decree which – what was agreed between the parties and the Court. There was in fact no hearing, there has been no trial. It was submitted –

THE COURT: Wait a minute. Now, are you contending that we did not have a trial in this case?

MR. GIBSON: Yes, your Honor, we have not had a trial.

THE COURT: I'm sorry, but we did have a trial. I heard the evidence in this divorce case and I don't know where you were, but there was a trial.

MR. GIBSON: On March the 18th when we sat in your office there was

THE COURT: The trial was after that. We did have a trial in which I heard all the evidence. The thought that you weren't here and did not come into the Court Room was obviously by your own choosing, but we did have a trial in which I heard all of the evidence presented by the Plaintiff. The Defendant did not appear and did not offer any evidence.

MR. GIBSON: That was before May 20th, is that right?

THE COURT: Yes, it was on the assigned date of trial.

MR. GIBSON: Well, I didn't know about that, your Honor. The only thing that happened that I know of is the date of the meeting in your office on March 18th.

THE COURT: Mr. Gibson, we did after that meeting appear here for trial. What occurred in my office was the – as you know spent most of the day at pretrial in which we attempted to settle the matter. The financial matters, as I understood it, were agreed on. We did then appear in the Court Room. The Court heard the evidence offered by the Plaintiff – the Plaintiff's evidence for divorce and the Court then proceeded to award the divorce and incorporate that agreement that had been reached into a decree and made it part – made it this Court's order. When you say there was no trial I think you must mean that there was no contested trial as such, but there certainly was a trial. There could not have been an order made without a trial. Now, the fact that you were not in the room doesn't mean that

a trial did not appear and did not occur, because one did most certainly occur.

MR. GIBSON: After – there was no notice, we didn't know about this.

THE COURT: It occurred that day.

MR. GIBSON: Which day?

THE COURT: The day you were here.

MR. GIBSON: March 18th?

THE COURT: That's right, March 18th. The trial occurred that day. Now, I'm sure you – this obviously is because you are not familiar with our procedure here, but ordinarily and we will in all cases where we have a contested case set for trial and the parties then reach an accord as to what division of property and so on will be made. The Plaintiff then proceeded to present her evidence in the open Court Room. I was on this bench and heard the matter – heard the Plaintiff's evidence on that particular day.

MR. GIBSON: This was on the same day?

THE COURT: Yes, and the Defendant then as in all of those cases chooses not to appear and did not offer any evidence. We then – as I recall we then followed this up. We then went into the library here at which time I dictated into the record the order of the Court as to what the judgment of the Court would be under those circumstances.

MR. ALBRIGHT: May it please the Court, it was just the reverse as I recall.

THE COURT: We went in there and dictated, that's right. We did go into the library first, dictated what the Court order would be if we went ahead on an uncontested basis. When you say there wasn't a trial you are totally in error and this is a mistake, we had a trial that day.

MR. GIBSON: I was going on what the Court Reporter transcribed and there is no indication of any trial.

THE COURT: You did not ask that a record be made of the testimony given by the Plaintiff. There was obviously no record made of the testimony given by the Plaintiff that day.

MR. GIBSON: I apoligize, I didn't know. I was looking at what the record shows.

THE COURT: I would say that 99.9 percent of our uncontested cases we do not have a reporter present. We rely on either the Plaintiff or the Defendant to request a reporter if they wish one to be present. So all that happened was the Reporter was

not present during the trial when the evidence for the divorce was taken . . . .